Jan 19 1877

Submitted

4-225

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 960.

THE UNITED STATES, APPELLANTS,

vs.

JAMES R. MEARS.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 10, 1877.

Jan 27 1877

Affirmed

Jan Hunt

SUPREME COURT OF THE UNITED STATES.

No. 960.

THE UNITED STATES, APPELLANTS,

vs.

JAMES R. MEARS.

APPEAL FROM THE COURT OF CLAIMS.

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1 United States Court of Claims.

JAMES R. MEARS
vs.
THE UNITED STATES. } No. 10723.

Petition.—Filed Nov. 20, 1875. *J. R.*

To the honorable Court of Claims:

On or about the 5th day of August, 1869, at Louisville, in the State of Kentucky, Brevet Lieutenant-Colonel H. C. Ransom, quartermaster, United States Army, paid to First Lieutenant Thomas E. Lawson, United States Army, the sum of $75.52, as mileage for traveling from Richmond, in the State of Virginia, to Hopkinsville, in the State of Kentucky, under orders to proceed to his home and await orders issued upon the consolidation of the Army under the act of March 3, 1869. The claimant, who was then a paymaster in the Army of the United States, paid to said Lawson his final payment on discharge, on or about the 14th day of November, A. D. 1870, without deducting said mileage. Whereupon the claimant was compelled, by an order of the Paymaster-General, a copy of which, marked "A," is hereto attached, to refund, and on or about the 14th day of November, 1873, did refund, said amount of $75.52 to the United States, as shown by the certificate of the assistant treasurer of the United States, a copy of which, marked "B," is hereto attached.

Said Lawson performed said journey, not on leave of absence, but under orders, as was adjudged by this court at the December
2 term, A. D. 1874, in the suit of said Lawson against the United States, numbered 10271, and was legally entitled to the said mileage.

By reason of the premises there is due from the United States to the claimant, on an implied contract, the sum of $75.52, to which the claimant is justly entitled, after an allowance of all just credits and offsets.

No action has ever been had on said claim by any Department of the Government or by Congress. The claimant is the sole owner of said claim, and no other person is interested therein. He is a citizen of the United States, a resident of Madison, in the county of Dane, and State of Wisconsin; has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided or abetted or given encouragement to rebellion against said Government. He demands judgment against the United States for the sum of $75.52.

HALBERT E. PAINE,
Claimant's Attorney.

THE DISTRICT OF COLUMBIA, *ss:*

Halbert E. Paine, having been duly sworn, says that he is the attorney of the claimant named in the foregoing petition; that no assignment or transfer of said claim, or of any part thereof, or of any interest therein has been made, except as in said petition stated; that the claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and that he believes the facts as stated in said petition are true.

H. E. PAINE.

Sworn to and subscribed before me by H. E. Paine this 19th day of November, A. D. 1875.

[L. S.]

I. L. JOHNSON,
U. S. Commr. for Dist. of Columbia.

Post-office address of claimant, Madison, Wisconsin.
Of claimant's attorney, Washington, D. C.

3 EXHIBIT A.

PAYMASTER-GENERAL'S OFFICE, WAR DEPARTMENT,
Washington, Oct. 28, 1873.

Major J. R. MEARS,
Paymaster U. S. A., Charleston S. C.:

SIR: On April 18, 1871, you were advised by letter from this office that, because of your payment of final pay on discharge to Lieut. T. E. Lawson, U. S. A., without first ascertaining, through the usual certificates, the amount of his indebtedness to the United States, the sum of such indebtedness, $75.52, would be charged to you.

The records of this office showing, as yet, no satisfaction of the charge in question, you will at once deposit the amount above stated with an assistant treasurer of the U. S., or other designated depositary, to credit of the Treasurer U. S., and forward the original certificate of such deposit to this office.

Very respectfully, your obedient servant,

BENJ. ALVORD,
Paymaster-General, U. S. A.

EXHIBIT B.

No. 801.] UNITED STATES TREASURY,
Charleston, S. C., November 14, 1875.

I certify that Maj. J. R. Mears, P. M. U. S. A., this day deposited to the credit of the Treasurer of the United States seventy-five $\frac{52}{100}$ dollars, on account of Lieut. T. E. Lawson, late of U. S. A., for which I have signed duplicate receipts.

$75\frac{52}{100}$ (Signed) J. D. GEDDINGS,
Assistant Treasurer U. S.

4 In the Court of Claims of the United States, December term, A. D. 1874.

JAMES R. MEARS
vs.
THE UNITED STATES. } No. 10723.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of seventy-five dollars and fifty-two cents, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, denies the said allegation.

THOMAS SIMONS,
Assistant Attorney-General.

Filed Nov. 24, 1875.

5 In the Court of Claims.

JAMES R. MEARS
vs.
THE UNITED STATES. } 10723.

At a Court of Claims held at the Capitol in the city of Washington the first day of June, A. D. 1876, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said James R. Mears, claimant, do have and recover of and from the United States the sum of seventy-five dollars and fifty-two cents, ($75.52.)

By the court:

A true copy of record.

6 In the Court of Claims of the United States, Dec. term, 1875.

JAMES R. MEARS
vs.
THE UNITED STATES. } No. 10723.

From the judgment rendered in the above-entitled cause on the first day of June, 1876, in favor of claimant, the defendants, by their Attorney-General, on the 26th day of August, 1876, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Asst. Attorney-General.

Filed August 26, 1876.

AT CHAMBERS.

Allowed.

C. D. DRAKE, *C. J.*

7 Court of Claims.

JAMES R. MEARS
vs.
THE UNITED STATES. } 10723.

FINDINGS OF FACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. On or about the 5th day of August, 1869, at Louisville, in the State of Kentucky, Brevet Lieutenant-Colonel H. C. Ransom, quartermaster United States Army, paid to First Lieutenant Thomas E. Lawson, United States Army, the sum of seventy-five dollars and fifty-two cents, as mileage for travel performed by said Lawson from Richmond, in
8 the State of Virginia, to Hopkinsville, in the State of Kentucky, under orders to proceed to his home and await orders; which order was issued upon the consolidation of the Army under the act of March 3, 1869.

II. The claimant, being a paymaster in the Army of the United States, paid to said Lawson the final payment due said Lawson on his discharge from the Army, on or about the 14th day of November, 1870, without deducting the said sum of $75.52.

III. On the 28th of October, 1873, the Paymaster-General of the United States Army, holding that the payment by Colonel Ransom to said Lawson of the said sum of $75.52 to have been illegal, re-
9 quired the claimant to refund that amount to the United States, and to that end addressed to claimant the following letter:

PAYMASTER-GENERAL'S OFFICE, WAR DEPARTMENT,
Washington, Oct. 28, 1873.

Major J. R. MEARS,
Paymaster U. S. A., Charleston, S. C.:

SIR: On April 18, 1871, you were advised by letter from this office that, because of your payment of final pay on discharge to Lieut. T. E. Lawson, U. S. A., without first ascertaining, through the usual certificates, the amount of his indebtedness to the United States, the sum of such indebtedness, $75.52, would be charged to you.

The records of this office showing as yet no satisfaction of the
10 charge in question, you will at once deposit the amount above stated with an assistant treasurer of the U. S., or other designated depositary, to credit of the Treasurer U. S., and forward the original certificate of such deposit to this office.

Very respectfully, your obedient servant,

BENJ. ALVORD,
Paymaster-General, U. S. A.

IV. In obedience to the requirement of said letter the claimant paid $75.52 into the United States Treasury, to the credit of the Treasurer of the United States, on account of said Lawson, and took the following receipt therefor:

UNITED STATES TREASURY,
Charleston, S. C., November 14, 1875.

11 No. 801.]

I certify that Maj. J. R. Mears, P. M. U. S. A., this day deposited to the credit of the Treasurer of the United seventy-five $\frac{52}{100}$ dollars, on account of Lieut. T. E. Lawson, late of U. S. A., for which I have signed duplicate receipts.

$75.\frac{52}{100}$.

(Signed) J. D. GEDDINGS,
Assistant Treasurer U. S.

Upon the foregoing facts the conclusions of law is that the claimant was not legally bound to pay the sum of $75.52 into the Treasury, and having paid it in obedience to the order of his superior officer, he is entitled to recover it back; and judgment for that sum should be rendered in his favor.

By the court.

Filed June 1, 1876.

12 The court did not deliver an opinion in this case.

13 In the Court of Claims.

JAMES R. MEARS
vs.
THE UNITED STATES. } No. 10723.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the

above-entitled cause, and the final judgment of the court thereon, of the application of the Attorney-General for the defendants for the allowance of an appeal, as filed in the clerk's office August 26, 1876, and of the order of the chief-justice of said court allowing the same, of the findings of fact by the court, and the conclusion of law thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this ninth day of October, A. D. 1876.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) No. 960. The United States, appellants, vs. James R. Mears. Court of Claims. Filed 10th January, 1877.

Supreme Court of the United States.

OCTOBER TERM, 1876.

THE UNITED STATES, APPELLANTS,
vs.
JAMES R. MEARS, APPELLEE.
} No. .....

APPEAL FROM COURT OF CLAIMS.

ARGUMENT FOR APPELLEE.

PAINE & GRAFTON,
Attorneys for Appellee.

Supreme Court of the United States.

OCTOBER TERM, 1876.

THE UNITED STATES, Appellants,
vs.
JAMES R. MEARS, Appellee,
No. ——

APPEAL FROM THE COURT OF CLAIMS.

ARGUMENT FOR APPELLEE.

STATEMENT.

On or about the 5th day of August, 1869, at Louisville, in the State of Kentucky, Brevet Lieutenant Colonel H. C. Ransom, Quartermaster United States Army, paid to First Lieutenant Thomas E. Lawson, United States Army, the sum of $75.52, as mileage for traveling from Richmond, in the State of Virginia, to Hopkinsville, in the State of Kentucky, under orders to proceed to his home and await orders issued upon the consolidation of the army under the act of March 3, 1869. The appellee, who was then a paymaster in the army of the United States, paid to said Lawson his final payment on discharge, on or about the 14th day of November, A. D. 1870, without deducting said mileage. But the War Department decided that officers who were ordered home to await orders, at their own request, upon the consolidation of the army, under said act of March 3, 1869, were virtually on leave of

absence, and that Lieut. Lawson was therefore not entitled to mileage for his travel to his home under such orders, and, on that ground, compelled the appellee to refund to the United States the amount of the mileage which Lieut-Col. Ransom had paid to Lieut. Lawson, and which the appellee had omitted to deduct from his final payment. The appellee refunded this amount on the 14th day of November, 1873, and subsequently brought his action to recover the same in the Court of Claims. The Court of Claims rendered judgment for $75.52 in favor of the appellee, on the 1st day of June, 1876, from which judgment the United States have appealed to this Court.

Argument.

I.

The only question in the case is, whether Lieutenant Lawson was lawfully entitled to the mileage paid. By the 37th section of the act entitled, "An act to increase and fix the military peace establishment of the United States," approved July 28, 1866, the Army Regulations of 1863 were made a part of the law of the United States. By section 1109 of the Army Regulations of 1863 it is provided that "an officer who travels not less than ten miles without troops, escort, or military stores, and under special orders in the case from a superior, or a summons to attend a military court, shall receive ten cents mileage."

That Lieutenant Lawson was traveling under orders, and not on leave of absence, is established by the decision of the Supreme Court of the United States in Williamson's case. (See 10 Court of Claims, 50.)

The order in this case was substantially the same as that in Williamson's, and, like that, was issued at the consolidation of the army, under the law of March 3, 1869, in pursuance of general orders of the War Department numbers 16 and 17. The ground taken by the War Department that Lieut. Lawson was on leave of absence and therefore not en-

titled to mileage, was virtually overruled by this Court in Williamson's case, in which the government claimed that Capt. Williamson was not entitled to full pay, because on leave of absence. But this Court held that Capt. Williamson, under his orders to proceed home and await orders, was not on leave of absence, but on duty. This has been argued at length at the present term in the United States *v.* Chilson, in which case, as perhaps also in the case at bar, the appellants ask a reconsideration of the questions involved in Williamson's case.

II.

But it is claimed by the appellants that section 1117 of the army regulations furnished valid ground for withholding mileage from Lieut. Lawson, independent of that on which the War Department predicated its action in the premises. Section 1117 is in these words:

"1117. When officers are permitted to exchange stations, or are transferred at their own request from one regiment or company to another, the public will not be put to the expense of their transportation. They must bear it themselves."

It is conceded that the appellee cannot recover if the Attorney General is correct in his construction of the words "when officers are permitted to *exchange stations*." If these words apply to cases where officers are merely ordered at their own request from one station to another, certainly Lieut. Lawson was not entitled to mileage. But the words in question have no such application. They apply to those numerous cases where two officers are permitted to exchange stations *with each other*, and to no others.

If it had been the object to provide for withholding mileage where officers are ordered at their own request from one station to another, as well as in the particular cases where they are transferred at their own request from one regiment or company to another, the words required would have been very few and easily found, and very different from those actually used. The regulation would have taken substan-

tially this form: "When officers are transferred at their own request from one station, regiment, or company, to another, the public will not be put to the expense of their transportation;" or this: "When officers are permitted to exchange one station, regiment, or company, for another, the public will not be put to the expense of their transportation." But the regulation, in its present form, was adopted because it was not the purpose to place upon the same footing the case where officers are permitted to exchange stations with each other, and the case where an officer is merely ordered from one station to another at his own request. It was not the purpose to provide generally for cases of removals of officers at their own request from one station to another, but only for transfers from one regiment or company to another. . At the same time it *was* the object to provide generally for exchanges of stations by officers with each other. Accordingly, two provisions are made:

1. Officers who are allowed to exchange stations with each other are compelled to bear the expense of their transportation. And this applies alike to stations with and without troops.

2. Officers who are transferred at their own request from one regiment or company to another are compelled to bear the expense of their transportation. While this also *may* apply to stations, it can, of course, only apply to those stations where there are troops.

III.

Again, it is alleged that a certain proviso of the army appropriation act approved March 3, 1859, authorized the War Department to withold mileage from Lieut. Lawson. The entire paragraph was in these words: "For mileage, or the allowance made to officers of the army for the transportation of themselves and their baggage, when traveling on duty, without troops, escort, or supplies, one hundred and twenty-five thousand dollars: Provided, that mileage shall not be

allowed when the officer has been transferred or relieved at his own request." 11 Stat. 432.

But for three good reasons the War Department could not, as it did not attempt to, base its reclamation of Lieut. Lawson's mileage upon this proviso, any more than upon section 1117 of the army regulations.

In the first place, this proviso was not a permanent statutory provision applicable to all subsequent appropriations for officers' mileage; but its operation was restricted to the particular appropriation for the fiscal year 1860, which it limited and qualified. No other army appropriation act ever contained a proviso like this. In each of the army appropriation acts for ten years immediately preceding, and six years immediately following the enactment of the paragraph under consideration, the mileage appropriation was in the following words: "For mileage, or the allowance made to officers of the army for the transportation of themselves and their baggage, when traveling on duty, without troops, escort, or supplies, (so many) thousand dollars," without any proviso.

The rule of interpretation for this proviso is stated by Mr. Justice Story, in Minis *v.* The United States, 15 Peters 445:

"It would be somewhat unusual to find engrafted upon an act making special and temporary appropriation any provision which was to have a general and permanent application to all future appropriations. *Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation.* The office of a proviso generally is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview. A general rule, applicable to all future cases, would most naturally be expected to find its proper place in some distinct and independent enactment."

In Voorhees *v.* Bank, 10 Peters, 471, this Court said:

"The various acts required to be done, previous to a sale, are prescribed by a proviso, which, in deeds and laws, is a limitation or exception to a grant made, or authority conferred; the effect of which is to declare that the one shall not operate for the other be exercised unless in the case provided."

In Detroit *v.* Plank Road Company, 12 Mich., 337, the question was as to the effect of a proviso to an act amendatory of the defendant's charter. The amendatory act was in these words: "Said Detroit & Erie Plank Road Company may, and they are hereby empowered to, extend their road, on Gratiot street, to Randolph street, in the city of Detroit: Provided, that no toll gate shall be erected or maintained within the limits of said city by said company." The plaintiff insisted that the proviso interdicted the establishment of any toll gate in the city. The defendant claimed that the proviso only prevented the establishment and maintenance of toll gates, in the city, *on the extension of the plank road*, which the act authorized. The Supreme Court, deciding this question in favor of the defendant, said: "The proviso is no more extensive in its operation than the power which it qualifies; and both are confined in their operation to that part of the road authorized to be constructed between the city limits, as then established, and Randolph street."

In the next place, while it is conceded that the words "transferred" and "relieved," when not employed in their military sense, often take meanings broad enough to cover the cases of officers ordered home to await orders, it is respectfully submitted that to a fair and reasonable interpretation of the proviso it is essential that these words be used in their ordinary military significations. These are clear and well-established. It is a common occurrence in the army for two officers of different regiments or companies, or of different arms of the service, to request to be transferred, each preferring the duty of the other. The change, if allowed, is designated a transfer. Each officer is transferred at his own request. In this sense the word is used in section 1117 of the

army regulations, already quoted. The object and effect of the employment of the word "transferred," in the proviso, were not to *add to*, but, out of abundant caution, to guard against *taking from* that regulation. The proviso, in order to save the regulation, presents, in a general form, what is more particularly expressed in the regulation. The proviso prohibits the payment of mileage to officers who are transferred at their own request. Transferred from what, and to what? The proviso does not show. But the regulation, in which the word is used in its ordinary military sense, does show. The transfers covered by the proviso are transfers from one regiment or company to another.

Again, the word "relieved" is also used in the proviso in its ordinary military sense. That is correctly given by Webster as follows:

"4. Hence, to release from a post or station by substitution of others; to put another in the place of, or to take the place of, in the bearing of any burden or the discharge of any duty."

But, in the third place, let it be assumed, for the sake of argument, that the proviso was intended as a permanent statutory provision, applicable to the disbursement of subsequent army appropriations, as well as of that for the fiscal year 1860, and that the effect of the proviso was, not merely to save, but to enlarge the prohibitions of regulation 1117. It is submitted that the subsequent general law of July 17, 1862, "to define the pay and emoluments of officers of the army and for other purposes," would by neutralizing this proviso repeal it, leaving the regulation to stand precisely as it was before the proviso was enacted. The provision of the act of July 17, 1862, to which we refer, is in these words: "In lieu of the present rate of mileage allowed to officers of the army, when traveling on public duty, where transportation in kind is not furnished to them by the government, not more than six cents per mile shall hereafter be allowed, unless where an officer is ordered from a station east of the

Rocky Mountains to one west of the same mountains, or vice versa, when ten cents per mile shall be allowed to him; and no officer of the army or navy of the United States shall be paid mileage *except for travel actually performed at his own expense and in obedience to orders.*" 12 Stat. 594. It would seem clear, on the principle "*expressio unius est exclusio alterius,*" that after the enactment of the law of 1862, if any prohibitions, additional to those of regulation 1117 were in force, they were only such as were created by that law.

PAINE & GRAFTON,
Atty's for Appellee.

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Smiths Brief

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

UNITED STATES, APPELLANTS, *vs.* JAMES R. MEARS.	No. 960.	
UNITED STATES, APPELLANTS, *vs.* GEORGE W. CHILSON.	No. 961.	4-225
UNITED STATES, APPELLANTS, *vs.* EDWARD B. RHEEM.	No. 962.	4-225
UNITED STATES, APPELLANTS, *vs.* FREDERICK M. LYNDE.	No. 963.	4-225
UNITED STATES, APPELLANTS, *vs.* FREDERICK PHISTERER.	No. 964.	4-219

Brief for Defendants, submitted under Rule 20 of this court.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

UNITED STATES, APPELLANTS, *vs.* JAMES R. MEARS.	No. 960.
UNITED STATES, APPELLANTS, *vs.* GEORGE W. CHILSON.	No. 961.
UNITED STATES, APPELLANTS, *vs.* EDWARD B. RHEEM.	No. 962.
UNITED STATES, APPELLANTS, *vs.* FREDERICK M. LYNDE.	No. 963.
UNITED STATES, APPELLANTS, *vs.* FREDERICK PHISTERER.	No. 964.

BRIEF FOR DEFENDANTS, SUBMITTED UNDER RULE 20 OF THIS COURT.

STATEMENT.

No. 964. FREDERICK PHISTERER.

The petition of Frederick Phisterer, omitting formal parts, is this:

That from January 31, 1870, to July 15, 1870, he was a captain of infantry in the Army of the United States.

That upon the consolidation of the Army under the act of March 3, 1869, he was ordered home to await orders, and left his post at Fort Bridger, Wyoming Territory, and proceeded to his home at New York City, and remained awaiting orders from January 31, 1870, until July 15, 1870.

That during that time he was furnished no quarters, and that the Government had no public quarters at New York which could be furnished him, and that under section 37 of the act of July 28, 1866, and sections 1068, 1080, and 1081 of the Army Regulations he was entitled to commutation for fuel and quarters, and also to mileage from his said post to his said home, and prays judgment. His amended petition alleges that from the first week in March, 1870, to the 15th day of July, 1870, his home was at Littleton, N. J., and that he resided there during said period of time, and that during said period there were no public quarters which could be furnished him.

The Court of Claims upon the evidence found the facts to be as follows:

1. The claimant, being a captain of infantry in the Army of the United States from May, 1869, was, by special orders of January 7, 1870, from the Adjutant-General's Office, *at his own request*, ordered *home* to await orders; and left his post, Fort Bridger, Wyoming Territory, January 22, 1870. On January 31 and February 28, 1870, he reported as awaiting orders at New York City, and March 31, 1870, at Littleton, N. J. He was discharged the service, at his own request, August 4, 1870. The distance from Fort Bridger, Wyoming Territory, to New York City was 2,305 miles, and from Fort Bridger to Littleton, N. J., was 2,274 miles. It does not otherwise appear where the claimant's home was; except

that about the 1st of March, 1870, he was living in New York City, and at that time moved to Littleton, N. J., with his family, and continued to reside there, making it his home to the 15th of July following and subsequently.

2. While awaiting orders from January 31, 1870, to July 15, 1870, the claimant did not apply for quarters or fuel, and there were no quarters at New York City or Littleton, N. J., subject to the control of the Quartermaster's Department, which could have been assigned to him.

The rate allowed by the War Department for commutation of officers' quarters was $18 a room per month. The commutation price at which fuel was commuted by the Department, at New York City, during February and March, 1870, was $7.29 per cord; and the market-price of wood at Littleton, N. J., from March 1, to July 15, 1870, was $6 a cord.

3. Monthly reports were not received by the War Department from the claimant, as required by the regulations of the Army; and it does not appear when he arrived at New York City; nor were his whereabouts known to the Department or proved in the case; except so far as those facts appear or can be inferred from the foregoing findings.

4. It does not appear that the claimant obtained or asked for permission to change his home or residence from New York City to Littleton, N. J., or that any objection was made by the War Department to his having done so.

CONCLUSIONS OF LAW.

1. The claimant was entitled to mileage while traveling from Fort Bridger to New York City, and to com-

mutation, while awaiting orders from January 31 to July 15, 1870, for quarters and fuel.

2. He should recover for mileage for 2,305 miles, at 10 cents per mile $232 50

For commutation of quarters, while awaiting orders, from January 31 to July 15, 1870, for three rooms 5½ months, at $18 per month each room 297 00

For commutation of fuel at New York City, 2 months, 2½ cords per month, at $7.29 per cord 36 45

And at Littleton, N. J., 1 month, 2 cords, and 2½ months, ½ cord per month, at $6 per cord. 19 25

585 20

Certain decisions of the War and Treasury Departments are also admitted as part of the record. These are some of a large number of said decisions on the subject in question, extending from 1851 to the present time, and deciding substantially as follows:

That the general rule which has governed the practice of the Departments is based upon the principle, announced long since by the accounting-officers of the Treasury, that the allowance for fuel and quarters was not a right of statutory authority, but a matter of executive regulation, under which this allowance belonged to officers as a matter of right only when they were assigned to some particular duty or work for the Government, or was granted to others only for strong reasons in executive discretion. That such special allowance, it is believed, has been generally confined to cases where officers were ordered to some place *other than their established residence* to wait assignment to some particular

duty upon which they were afterward placed. That in this view, *commutation of fuel and quarters was regarded as an instrumentality for the performance of some actual work for the Government*, like a tent in the field, or a public horse lent a foot-officer for some particular service, and *not as an emolument or provision for habitual personal expenses.*

That by express regulation, accordingly, in time of war, an officer in the field, without other shelter than a tent afforded, was not allowed this provision, although if he had a family the expenses of his household were rather augmented than diminished by the fact that he was required to live in a different place from them, and so furnished with camp-equipage.

That the word "station," as used in the Regulations, was thus construed to mean a place of public service, where officers were at work for the Government, not one where they were casually staying, whether on leave of absence or while awaiting employment by a permission or *order, under which, as they knew very well*, or ought to have known, *they would be allowed to select their own residence.*

That an officer awaiting orders cannot be properly regarded as on duty.

That to test a decision of Attorney-General Black, an estimate was made to Congress for commutation of quarters for officers "awaiting orders," but that no appropriation for such purpose has ever been made.

That to "enable an officer to draw commutation of fuel and quarters he must be assigned to some specific duty at a *commutation post.*"

That "paragraphs 1080, 1082, 1083, and 1086, Revised Army Regulations, do not contemplate the payment of

commutation to officers awaiting orders, nor have any orders (August 2, 1869) issued since the regulations were published authorized such payment."

That "an officer to be entitled to these allowances must be assigned to some specific duty *at the place where he claims them*, and must make requisition upon the quartermaster for them."

That the allowance for fuel and quarters is not, like pay and subsistence, *an absolute right pertaining, under all circumstances, to the officer's rank*, but depending on certain conditions of *duty and service.*

That an order putting an officer then on duty to "awaiting orders" did not place him on duty, but relieved him from duty.

It was decided in 1854, by Dr. Brodhead, that to obtain commutation an officer must, besides the other above-mentioned requirements, certify that he has not been on leave of absence *or awaiting orders* any part of the time charged in his account.

That "leave of absence and awaiting orders have long been considered equivalent and convertible terms, so far as they affect the right of an officer to fuel and quarters."

"In general terms, an officer must be assigned to *some specific duty* at the post where he claims to be entitled to quarters and fuel; on his arrival at his station he must make his requisition on the quartermaster for his quarters and fuel, accompanied by a copy of the order putting him on duty at the station; and it is only when, after such requisition, public quarters and fuel cannot be furnished, he becomes entitled to a money-allowance in lieu thereof, provided he is on duty without troops."

It is also admitted as part of the record that of the

officers so ordered home to await orders, in the same manner and under the same act as claimant, (some at their own request and some without such request,) some seventy of them reported from various places, (from two to six different places each,) and that, so far as appeared in evidence in these cases, no permission was asked or obtained to so change their location, nor was any objection made to their having done so. Only two of such cases are noted here, as samples of all:

Case of Seth Bonney:

Under section 2 of the act of Congress of March 3, 1869, the above-named officer was rendered supernumerary June 14, 1869, but remained on duty until January 27, 1870, when he was ordered from Saint Louis, Mo., to his home, Sterling, Mass., to await orders. He subsequently reported as awaiting orders as follows: January 31 to March 31, 1870, at Sterling, Mass.; April 30, 1870, at Byron, Me.; May 31 and June 30, 1870, at Sterling, Mass.; July 30, 1870, at Byron, Me.; August 31 to November 30, 1870, at Dixfield, Me., and December 31, 1870, at Sterling, Mass. By orders of January 2, 1871, from this office, he was assigned to the Thirteenth Infantry.

Joseph B. Collins:

In the consolidation of the infantry regiments of the United States Army, (authorized by section 2 of the act of Congress of March 3, 1869,) the above-named officer was, by General Orders No. 17, March 15, 1869, from this office, left out, and by Special Orders No. 62, Headquarters Department of the Cumberland, April 3, 1869, was ordered home to await orders.

He left his post, Louisville, Ky., in April, 1869, (exact date not reported,) and from April 30, 1869, to November

30, 1869, reported as awaiting orders at Green Bay, Wis. He subsequently reported as follows: From December 31, 1869, to March 31, 1870, at Horicon, Wis., April 30, 1870, at Winchester, Va.; May 31, 1870, at Bethlehem, Pa.; and June 30, 1870, to December 31, 1870, at Circleville, Ohio. He was honorably mustered out of service by General Orders No. 1, January 2, 1871, from this office.

ASSIGNMENT OF ERRORS.

It is also admitted as part of the record that some forty or fifty orders, involving material changes, modifications, and alterations of the Army regulations in force July 28, 1866, have been issued by the Secretary of War since that date, from time to time, one of which increased the price of commutation of rooms from $9 to $18, and another increased the price of fuel. These orders are omitted by consent, as it would make the record so voluminous.

The Court of Claims gave judgment for the claimant for the amount above indicated; which judgment the United States consider erroneous and assign for error, averring that its judgment should have been that the petition be dismissed.

No. 963. FREDERICK M. LYNDE.

The petition of Frederick M. Lynde alleges that he was a lieutenant of infantry from March 22, 1870, to May 10, 1870, and was ordered home to await orders, under the act of March 3, 1869, and left his post, Fort Rice, Dak., and proceeded to his home at Baltimore, and remained awaiting orders from March 22, 1870, until May 10, 1870, and that no public quarters were or

could be furnished to him at Baltimore, and that he is entitled to commutation of fuel and quarters during that time, and prays judgment.

The Court of Claims, upon the evidence, found the facts to be as follows:

1. The claimant being a lieutenant of infantry in the Army of the United States from May, 1869, was, by special field orders, headquarters of the Department of Dakota, July 22, 1869, ordered home to await orders, and left his post, Fort Rice, Dakota, July 27, 1869. He was on awaiting orders at Little Canada, Minn., September 30, 1869, and at Baltimore, Md., in October, 1869; on reconstruction-duty at Jackson, Miss., to December, 1869; conducting recruits from January 10 to March 22, 1870, and from that date again awaiting orders to May 10, 1870, at Baltimore, Md. It does not otherwise appear where his home was.

2. While awaiting orders at Baltimore from March 22 to May 10, 1870, the claimant did not apply for quarters or fuel, and there were no quarters at that place subject to the control of the Quartermaster's Department which could have been assigned to him. The rate allowed by the War Department for commutation of officers' quarters was $18 a room per month, and the lowest market-price for wood at Baltimore during said time was $5.93 per cord.

ADDITIONAL FINDING.

3. It does not appear that any reports were made by the claimant for the months of August and November, 1869, nor does it appear where were his whereabouts during those months, except so far as the same appears or may be inferred from the foregoing findings.

CONCLUSIONS OF LAW.

1. The claimant was entitled to commutation of fuel and quarters while awaiting orders at Baltimore from March 22 to May 10, 1870.

2. The commutation for quarters which he should recover is for 2 rooms, 1 month and 18 days, at $18 per month each $57 60

And the commutation for fuel is for 1 month and 8 days, at 2 cords per month, and 10 days, at ½ cord per month, at $5.93 per cord..... $19 30

$76 90

The other facts and matters are admitted of record in this case, the same as in the case of Phisterer, as above.

ASSIGNMENT OF ERRORS.

A like judgment was rendered, to which the same error is assigned.

No. 962. EDWARD B. RHEEM:

The petition of Edward B. Rheem alleges that he was a lieutenant of infantry from November 30, 1869, to January 31, 1870. That upon the consolidation under the act of March 3, 1869, he was ordered home to await orders, and left his post, Camp Goodwin, Ariz., and proceeded to his home at Carlisle, Pa., and remained, awaiting orders, from November 30, 1869, until January 31, 1870, and that no public quarters were or could be furnished him, and prays judgment for commutation of fuel and quarters.

The Court of Claims, upon the evidence, found the facts to be as follows:

1. The claimant, being a lieutenant of infantry in the Army of the United States, from May, 1869, was, by Special Orders of August 19, 1869, from the Adjutant-General's Office, *at his own request* ordered *home* to await orders, and left his post, Camp Goodwin, Ariz., September 30, 1869, reporting to the War Department, November 30, 1869, from Carlisle, Pa., as awaiting orders. By special order of January 29, 1870, from the Adjutant-General's Office, he was assigned to the Twenty-first Regiment of Infantry and directed to report to Carlisle Barracks, Pa. It does not otherwise appear where the claimant's home was at any time.

2. While awaiting orders from November 30, 1869, to January 29, 1870, the claimant did not apply for quarters or fuel, and there were no quarters at Carlisle, Pa., subject to the control of the Quartermaster's Department, which could have been assigned to him. The rate allowed by the War Department for commutation of officer's quarters was $18 a room per month, and the price at which fuel was commuted by the Department at said Carlisle was $4.55 per cord.

CONCLUSIONS OF LAW.

1. The claimant was entitled to commutation of fuel and quarters while awaiting orders at Carlisle, Pa., from November 30, 1869, to January 29, 1870.

2. The commutation which he should recover is—

For quarters for 2 months, 2 rooms at $18 per month each	$72 00
And for fuel 2 months, 2½ cords per month, at $4.55 per cord	22 75
	94 75

The other facts and matters are admitted of record in this case, the same as in the case of Phisterer, as above.

ASSIGNMENT OF ERRORS.

A like judgment was entered, to which the same error is assigned.

No. 961. GEORGE W. CHILSON:

The petition in case of Chilson alleges that he was a first lieutenant of infantry from September 1, 1869, to April 30, 1870, and upon consolidation of the Army under the act of March 3, 1869, he was, on the 16th day of August, 1869, ordered home to await orders, and left his post at Camp Reno, Ariz., on the 1st day of September, 1869, proceeded to his home at Detroit, Mich., and remained awaiting orders from September 1, 1869, until April 30, 1879, and that no public quarters were or could be furnished him at Detroit, and claims judgment for commutation of fuel and quarters.

The Court of Claims, upon the evidence, found the facts to be as follows:

1. The claimant, being first lieutenant in the Twenty-first Regiment of United States Infantry, on the 16th August, 1869, *at his own request* was ordered *home* to await orders. On the 1st September, 1869, he accordingly left his post at Camp Reno, Ariz., and proceeded to his home in Detroit, Mich. From the 30th September, 1869, to the 30th April, 1870, he reported as awaiting orders at Detroit. Subsequently he was assigned to duty on recruiting-service at Detroit.

2. The claimant did not apply for quarters or fuel to the quartermaster at Detroit. There were no quarters at that place during the above period subject to the con-

trol of the Quartermaster's Department which could have been assigned to him. The rate allowed by the War Department for commutation of officer's quarters was $18 a room per month. The rate allowed for commutation of fuel was, on the average, $10.25 a cord.

And upon the facts found in this case the Court of Claims decides the following

CONCLUSIONS OF LAW.

1. The claimant was entitled to commutation of fuel and quarters from the time of his reporting as awaiting orders, after his arrival in Detroit, until he was assigned to duty.

2. The commutation for quarters, which he should recover, is for that of two rooms, at $18 a room a month.

The same error is assigned.

No. 960. JAMES R. MEARS:

The petition of Mears alleges that, on the 5th of August, 1869, Col. H. C. Ransom, quartermaster, paid First Lieut. Thomas E. Lawson, United States Army, the sum of $75.52 as mileage, traveling from Richmond, Va., to Hopkinsville, Ky., under orders to proceed to his home and await orders under the said act of March 3, 1869. That claimant, who was then paymaster United States Army, paid said Lawson his final payment on discharge, on or about November 16, 1869, without deducting said mileage, and that claimant was compelled, by an order of the Paymaster-General, to refund said amount of $75.52, which he did about November 14, 1873, and claims judgment for the same.

The Court of Claims, upon the evidence, found the facts to be as follows:

I. On or about the 5th day of August, 1869, at Louisville, in the State of Kentucky, Brevet Lieut. Col. H. C. Ransom, quartermaster of the United States Army, paid to First Lieut. Thomas E. Lawson, United States Army, the sum of $75.52, as mileage for travel performed by said Lawson from Richmond, in the State of Virginia, to Hopkinsville, in the State of Kentucky, under orders to proceed to his home and await orders; which order was issued upon the consolidation of the Army under the act of March 3, 1869.

II. The claimant, being a paymaster in the Army of the United States, paid to said Lawson the final payment due said Lawson on his discharge from the Army, on or about the 14th day of November, 1870, without deducting the said sum of $75.52.

III. On the 28th day of October, 1873, the Paymaster-General of the United States Army, holding the payment by Colonel Ransom to said Lawson of the said sum of $75.52 to have been illegal, required the claimant to refund that amount to the United States, and to that end addressed to claimant the following letter:

"*Exhibit A.*

"PAYMASTER-GENERAL'S OFFICE,
"WAR DEPARTMENT,
"*Washington, October* 28, 1873.

"SIR: On April 18, 1871, you were advised by letter from this office that, because of your payment of final pay on discharge to Lieut. T. E. Lawson, United States Army, without first ascertaining through the usual certificates the amount of his indebtedness to the United States, the sum of such indebtedness ($75.52) would be charged to you.

"The records of this office showing as yet no satisfaction of the charge in question, you will at once deposit the amount above stated with an assistant treasurer of the United States, and forward the original certificate of such deposit to this office.

"Very respectfully, your obedient servant,

"BENJ. ALVORD,

"*Paymaster-General U. S. A.*

"Maj. J. R. MEARS,

"*Paymaster U. S. A., Charleston, S. C.*"

IV. In obedience to the requirement of said letter the claimant paid $75.52 into the United States Treasury, to the credit of the Treasurer of the United States, on account of said Lawson, and took the following receipt therefor:

"UNITED STATES TREASURY,

"*Charleston, S. C., November* 14, 1875.

"No. 801.]

"I certify that Maj. J. R. Mears, paymaster U. S. A., this day deposited to the credit of the Treasurer of the United States $75.52 on account of Lieut. T. E. Lawson, late of United States Army, for which I have signed duplicate receipts.

"$75.52.

"E. D. GEDDINGS,

"*Assistant Treasurer United States.*"

Upon the foregoing fact the conclusion of law is that the claimant was not legally bound to pay the sum of $75.52 into the Treasury, and having paid it in obedience to the order of his superior officer, he is entitled to recover it back, and judgment for that sum should be rendered in his favor.

ASSIGNMENT OF ERROR.

1. The United States assign as error the judgment in favor of the claimant.

2. That the judgment should have been that the petition be dismissed.

3. That, as the court find, the claimant was under no legal obligation to pay this sum of $75.52 into the Treasury, and could not be held to obedience to any order of his superior to do so; hence, the court should have declared the payment voluntary and that the claimant could not recover it.

ARGUMENT.

Though the aggregate amount of the numerous claims, of which those now brought before this court are samples, is large, the law and facts upon which they rest will be but briefly discussed. Voluminous facts, additional to those found by the Court of Claims, are stipulated by counsel to be made part of the record in order to present the questions common to most of this class of cases, and thereby to obviate, if possible, the necessity of any further appeals of such causes, however these may be determined.

That of Mears, first in order of numeration upon the docket, is open (as we think) to a separate, as well as to the common, defense, and will, therefore, be last considered.

It is apprehended that effort will be made to show these cases to be included within the principles upon which that of Williamson was decided, (23 Wall., 411;) but we do not believe that case applies to those now under discussion. There is nothing so likely to delude as a specious, but false, analogy. Here, we shall endeavor to show that none exists.

It would be the obvious dictate of common sense that an officer returning to his own family and hearth-stone at his own request, should not be paid for the rent of a room not in fact used nor required for the public service, nor for fuel when only the same was consumed at his residence as had been before burned by his family, and none for public purposes.

The rulings of the Department, hereinbefore recited, (*ante*, p.—,) state the matter correctly; that a room and fuel are to be provided, directly or by commutation, when some public duty, to be done at the place where the officer is stationed, requires their use. Herein is the distinction between *pay* (to which *alone* Williamson's case relates) and quarters and fuel. The pay fixed by Congress and intended for the support of the officer and his family, and as a fair compensation for his services, and for the time in which he holds himself ready to serve, and is thereby precluded from engaging in any other occupation, cannot be reduced by departmental order or regulation; but, as to fuel and quarters, all the statute says is: "The existing regulations to remain in force until Congress shall have acted on said report;" *i. e.*, on a report therein provided for. (Act of July 28, 1866, c. 299, § 37; 14 Stats., 338, sixth line.) Those regulations were the revision promulgated August 10, 1861, except as to the few particulars in which they had been modified. The revision, with statutory and executive or departmental changes down to July 25, 1863, was published by the Government in book-form in 1863, which edition will be the one here cited. Upon all points on which Congress has not directly acted, these regulations had the force of law prior to the act of July 28, 1866, c. 299. (United States *v.* Eliason, 16 Pet., 302; United States *v.* Freeman, 3 Howd., 566, 567; Gratiot *v.*

United States. 4 Howd., 117, bottom; Hickey *v.* Huse, 56 Maine, 495, 496.) As to regular *pay*, Congress had acted; the matter of fuel and quarters was left to the regulations promulgated as aforesaid. (3 Howard, 566; 4 Howard, 117.) The Revised Statutes also say: "Sec. 1269. No allowances shall be made to officers in addition to their pay except as hereinafter provided. Sec. 1270. Fuel, quarters, and forage may be furnished in kind to officers by the Quartermaster's Department *according to law and regulations*." This revision is a mere compilation of previously-existing laws. The general tenor of the Revised Army Regulations, printed in 1863, upon this subject, is the same as the decisions of the War Department thereon above printed, (*ante* p. —.) (See Army Regulations, 159–163, §§ 1064–1095.) For instance, sec. 1073 says: "*Fuel issued to officers* or troops *is public property* for their use; what they do not actually consume shall be returned to the quartermaster and taken up on his quarterly return." If it were their own private emolument, they would have a right to dispose of the permitted quantity at their pleasure. Sec. 1080 treats of the right to commutation: "When quarters cannot be furnished to officers at stations without troops, or to enlisted men at general or departmental headquarters, quarters will be commuted at a rate fixed by the Secretary of War, and fuel at the market-price delivered. When fuel and quarters are commuted to an officer by reason of *his employment upon a civil work*, the commutation shall be charged to the appropriation for the work. No commutation of rooms or fuel is allowed for offices or messes;" and section 1072 concludes with the limitation that "fuel for a mess-room shall not be used elsewhere, nor for any other purpose." It is thus made obvious that the Department correctly construes the regulations

when it holds that the quarters and fuel, whether furnished directly by the Government, or indirectly through an expenditure of the commutation-money allowed therefor, must be strictly applied to the public uses for which they are allowed, and not treated at all as the private emolument of the officer. According to the practice of the War Department those claiming quarters and fuel must apply for them. These petitioners did not apply.

AS TO MEAR'S CASE.

Army Regulations, section 1117: "When officers are permitted to exchange stations, *or are transferred at their own request* from one regiment or company to another, the public will not be put to the expense of their transportation. They must bear it themselves."

The payment for mileage was unauthorized, and therefore properly disallowed in the adjustment of his account, (United States *v.* Webster, 2 Ware, 38, or Davies, 38;) therefore the sum he now seeks to obtain was *voluntarily paid* by him, and cannot be recovered. The Court of Claims so held in a case equally strong, (Hall's Case, 9 C. of Cls., 270,) and rightly, upon the ground that there was no legal obligation to pay, and that moral compulsion was a species of coercion not known to the law.

If this disbursement of public funds by the quartermaster, Colonel Ransom, was illegal, he was bound to replace that sum in the Treasury. If it was authorized, then he could be subjected to no *legal* discipline (under any law, civil or military) for making it, (Mitchell *v.* Harmony, 13 Howd., 115.) But if, to avoid inconvenience and dispute, he did pay it over as directed, it was a voluntary payment, which cannot be recalled.

EDWIN B. SMITH,
Assistant Attorney-General.

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